

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 3, 2006 Session

CARL B. STEWART v. CITY OF TELlico PLAINS, TENNESSEE

**Direct Appeal from the Circuit Court for Monroe County
No. V02300P Hon. Lawrence H. Puckett, Circuit Judge**

No. E2005-02189-COA-R3-CV - FILED MAY 1, 2006

An action pursuant to the Governmental Tort Liability Act resulted in an award of damages for personal injuries resulting from a collision between the plaintiff's motorcycle and defendant's police cruiser. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Benjamin Lauderback and Craig T. Smith, Knoxville, Tennessee, for appellant.

Robert W. White, Maryville, Tennessee, for appellee.

OPINION

In this case plaintiff alleged that he was injured in an accident that occurred between Officer Neil Turpin's police car and plaintiff's motorcycle, which occurred on November 11, 2001. He was operating his motorcycle on Highway 68 in Monroe County, and he saw a vehicle in the right lane ahead of him as plaintiff traversed the left lane. As he approached, the other vehicle driven by Officer Turpin, came over and collided with plaintiff's motorcycle. The Complaint alleged that Officer Turpin violated various statutes, including Tenn. Code Ann. §55-10-108, Tenn. Code Ann. §55-8-108(d), and concluded that defendants were liable for his damages. Subsequently, plaintiff amended his Complaint, adding claims that Turpin violated statutes regarding minimum speed, turn

signals, etc., and also added that the City was liable for Turpin's actions under the doctrine of respondeat superior.

At trial the plaintiff testified that he was 54 years old, and had retired in 1997 from the National Cash Register Company. He was very familiar with the intersection of the highway and Lake Road and on the day of the accident he was traveling on Highway 68 South on his 1995 Harley Davidson motorcycle. The accident occurred around 7:00 p.m., and it was totally dark.

Plaintiff testified that Highway 68 to his home was a mountainous road, with two lanes going uphill southbound, and one lane going downhill northbound. He was traveling in the left lane, having passed a slower vehicle that was in the right lane, as he proceeded up the mountain. He testified that when he entered a straight section he could see another car ahead in the right lane, and he estimated the car was 700-800 feet ahead. He testified that as he got closer, he could see that it was a police car, and that it was moving significantly slower than he was. He testified that he concluded he could pass the car by staying in the left lane, as it was in the right lane, and that he could easily pass the car before the two lanes merged back into one. He testified that he observed the car turn on its left blinker, and make a left turn from the right lane. He testified that he was closing on the car quickly, and did not have time to brake or go around the car to the right, so he reflexively moved to the left to avoid the car, crossing the double yellow line, and that as the car crossed the double yellow line, the right front side of his motorcycle impacted with the left front side of the police car. He testified that he then hit the guardrail, and was thrown into the weeds beyond it.

Plaintiff testified that he never saw the police car's brake lights come on, and that the car was turning left or making a U-turn from the right lane. He then testified to his injuries. Plaintiff reiterated that the police car did not simply move into his lane (the left lane), but rather turned more sharply, as if making a left hand turn from the right lane. He testified that he was aware that Lake Road was there, and that a car might possibly turn onto it, but he would expect a car turning left would be in the left hand lane prior to the turn.

Two automobile reconstruction experts testified to their theories of how the accident happened, and Turpin testified essentially disputing plaintiff's version of the accident, in that he said that he drove in the right lane for a distance and then merged into the left lane "two or three curves before" the impact. He stated that he checked his mirrors, and did not see any other vehicles, and further that he put on his left turn signal approximately 150-175 feet before the turn, and applied his brakes to slow.

The Court made findings from the bench, and stated there were two versions of the accident, and he was required to make a finding regarding credibility. The Court stated that the testimony of the officers was "more conclusory" than fact-based, and the Court found their credibility at issue. The Court found that Turpin did not want to admit, but eventually had to admit, that they were still checking the guardrail, because this would most likely place him in the right lane. The Court stated that Turpin was "somewhat too reticent and too careful" when asked what he was

doing, although he did eventually concede that they were checking the guardrail on the right side. The Court further found that the officers were “fine people”, but that “human nature is we remember accidents in ways that relieve us of blame and place it on somebody else.” The Court held the officers’ testimony was not credible, but found plaintiff’s testimony regarding how the accident happened was credible. The Court stated that he did not think plaintiff would pass a patrol car on the left across a solid yellow line unless he was forced to do so. The Court concluded that Turpin had, likely due to inattention or because his focus was on the guardrail, attempted to turn left from the right hand lane, and that 100% of the fault was attributable to Turpin. He then awarded plaintiff \$120,000.00 in damages.

Defendant appealed, and has raised these issues:

1. Whether the Trial Court erred in finding the city to be negligent?
2. Whether the Trial Court erred in its allocation of fault?

Defendant argues that the Trial Court erred in finding negligence, because plaintiff had failed to show that Turpin breached a duty of care. The defendant focused on plaintiff’s own testimony, characterizing his explanation of the accident as Turpin “moving” into the left lane or “slowly merg[ing] into the left lane”. This, of course, was not the substance of plaintiff’s testimony. Plaintiff stated unequivocally that Turpin turned on his left turn signal as if to merge, but then turned sharply in front of plaintiff as if turning left or making a U-turn, from the right lane. The Court found plaintiff’s version of the facts to be credible, and found Turpin to be negligent and 100% at fault, thereby implicitly finding that Turpin breached a duty of care.

Regarding the findings of the trial court, the Supreme Court has explained as follows:

Our scope of review is governed by Tennessee Rule of Appellate Procedure 13(d) and unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn.1984); *Foster v. Bue*, 749 S.W.2d 736, 741 (Tenn.1988). Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn.1987). Where the issue for decision depends on the determination of the credibility of witnesses, the trial court is the best judge of the credibility and its findings of credibility are entitled to great weight. This is true because the trial court alone has the opportunity to observe the appearance and the demeanor of the witnesses. *Royal Insurance Co. v. Alliance Insurance Co.*, 690 S.W.2d 541, 543 (Tenn. App.1985).

Tenn-Tex Properties v. Brownell-Electro, Inc., 778 S.W.2d 423, 425-426 (Tenn. 1989).

Thus, the Trial Court's finding regarding the credibility of plaintiff's testimony and the credit given to plaintiff's explanation of how the accident happened is entitled to great weight, and the evidence does not preponderate against the Trial Court's finding of negligence on the part of Turpin. The Trial Court's finding that Turpin improperly turned left from the right hand lane, established the basis for the conclusion that Turpin breached his duty of care. The Trial Court's finding of negligence is supported by the evidence. Tenn. R. App. P. 13(d).

Finally, defendant argues that the Trial Court erred in allocating 100% of the fault for the accident to Turpin. This finding is reviewed *de novo* with a presumption of correctness of the Trial Court. *Cross v. City of Memphis*, 20 S.W.3d 642 (Tenn. 2000). The finding of the Trial Court is also based largely on credibility of the witnesses, and the Trial Court's finding of credibility is to be given great deference. *Tenn-Tex Properties*.

Defendant insists that plaintiff was unreasonably attempting to pass Turpin on the left instead of the right. But as plaintiff explained, when Turpin turned in plaintiff's direction, plaintiff was not able to move to the right and get around the police car. The Trial Court found that Turpin turned left from the right hand lane in front of plaintiff, and that plaintiff was forced to move left and cross the yellow line in an effort to avoid a collision. Defendant further argues that plaintiff had the "last clear chance" to avoid the accident, solely because he was approaching the cruiser from the rear, but the Trial Court found that it was the inattention of Turpin that caused the accident, as plaintiff was visible for at least 8-9 seconds before Turpin made the left turn.

Deferring to the Trial Court on the issue of credibility, the evidence supports the finding by the Trial Court that the Trial Court's allocation of fault is proper. There is no credible evidence that plaintiff was operating his motor cycle in a negligent manner. Accordingly, we affirm the Trial Court on the issues presented and remand, with the cost of the appeal assessed to the City of Tellico Plains.

HERSCHEL PICKENS FRANKS, P.J.